BLACK, J.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

420

No. 189, Miscellaneous

SAMUEL SHEPHERD and WALTER IRVIN,
PETITIONERS,

v.

THE STATE OF FLORIDA,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD W. ERVIN
Attorney General

HOWARD S. BAILEY
Assistant Attorney General

REEVES BOWEN
Assistant Attorney General
Counsel for Respondent

INDEX

Subject Index

TABLE OF AUTHORITIES

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Florida is reported in 46 So. 2d 880.

Said opinion, and the order denying the petitioners' motion for rehearing, appear at pages 880 and 897 of the record.

JURISDICTION

The petitioners seek to invoke the jurisdiction of this Court under 28 U. S. C. Section 1257, upon the claim that they were denied the guaranties of the Fourteenth Amendment because the jury was chosen according to a system of racial proportional representation; and upon the claim that, in being denied a continuance, they were denied the adequate assistance of counsel; and upon the claim that the denial of their motions for change of venue and for continuance compelled them to undergo a trial dominated by passion and prejudice.

STATEMENT OF THE CASE

The crime was committed in Lake County, Florida, in the nighttime, during the early hours of July 16, 1949.

The petitioner Shepherd lived about two miles from Groveland (R. 785), which is in the southern part of Lake County. The petitioner Irvin lived in Groveland. (R. 804) They were placed in the Lake County jail on July 16th.

On the same day, the Circuit Judge ordered that the petitioners be removed to another county for safe-keeping. (R. 32)

The non-appealing defendant Greenlee was arrested at Groveland at about 3:15 to 3:30 A. M. on July 16th and was placed in the city jail. Later in the day, he was carried to the county jail to get him away from a threatening crowd at Groveland. (R. 820-824).

On July 18th, the Circuit Judge ordered Greenlee removed to another county for safe-keeping. (R. 33)

Within two or three days, a mob, or mobs, had burned the Shepherd home near Groveland. Such mob, or mobs, also burned two houses belonging to a negro voodoo doctor by the name of George Valree, who was resented by negroes and whites alike. (R. 234-235, 389)

The National Guard was called out and reached Groveland at about 10:30 P. M. on July 17th. Finding no one unruly, the guardsmen left at about 1:30 A. M. (R. 251-252)

The night of July 18th, the National Guard was again called out and went to Mascotte, about three miles from Groveland. The guardsmen arrived at Mascotte about 11:30 P. M. and, finding no evidence of violence there, left at about 12:15 and went to Groveland, where they stayed until about 2:30 A. M. and, everything being quiet there, went on home. (R. 251-254)

On July 19th, the 116th Field Artillery was called out from Tampa (R. 254) and stayed at Groveland, Mascotte, and Clermont [not in the trouble area, R. 238, 262] until the following Sunday, July 24th. (R. 238). The indictment was returned on July 22nd (R. 29) at the county seat, Tavares, which is some 25 to 30 miles from where the troops were posted in the trouble area.

Incidentally, although the Clerk of the Circuit Court testified that he didn't recall that any negro had served on previous grand juries for 21 years (R. 360), the petitioners' pleadings admitted that one negro had served on the grand jury that indicted them (R. 71).

The white people, in order to protect the negroes, removed them from the trouble area, which embraced an area about five miles square (R. 231) and included Mascotte and Sturkey's Still (R. 236-237), as well as Groveland.

Considerable newspaper publicity was given the matter. Most of the newspaper articles appeared during the period between July 16th and August 1st. A scattered few appeared at about the time of the arraignment on August 12th and thereafter until about August 25th. (R. 914-952)

There never was any excitement or ill feeling toward negroes at any place except in the small trouble area, which embraced an area about five miles square. (R. 231-232)

Race relations were in no way strained in the remainder of the county, where there was no excitement and where the two races were on friendly terms, as usual.

By the time of the trial, the case was no longer a topic of conversation in the county, and had all died out except for the last day or so when the trial date approached. (R. 238-240)

The petitioners were arraigned on August 12th. (R. 38) They were returned from Raiford to Lake County for the arraignment and they thereafter remained in Lake County. (R. 175-176)

The Circuit Judge promulgated special rules to govern the trial. (R. 43-45)

Before arraignment on August 12th, the trial court appointed Attorney Harry E. Gaylord to defend the petitioners. (R. 9)

At the time of said arraignment, defense counsel Gaylord agreed that the trial be set for August 29th, and it was accordingly set for that date. (R. 40-41)

Attorney Franklin H. Williams, employed by the National Association for the Advancement of Colored People

(R. 847), had come to Florida and begun an investigation on July 31st (R. 851).

Attorney Williams asked Attorney Gaylord if the latter was willing to be employed by the Association or by the defendants themselves. Gaylord declined such employment and told Williams that he would defend the case only as a court appointed lawyer, but would act in that capacity to the best of his ability. (R. 216) Then Williams obtained Attorney Akerman's services (R. 216-217) on August 22nd (R. 849).

On August 25th, Akerman, Price, and Williams appeared in court as defense counsel (R. 14), and the Court appointed counsel, Gaylord, was permitted to retire from the case (R. 15).

On August 25th, the trial date was changed from August 29th to September 1st. (R. 15)

The County Commissioners selected the jurors from the registered voters in the County, in the proportions that the numbers of negro registered voters and white registered voters bore to the total number of registered voters. (R. 353-355)

There were 14,182 registered voters in the county, of which 13,380 were whites and 802 were negroes. (R. 351)

The 1945 Florida State Census showed that in 1945 there were 18,085 people of voting age in the county, of which 13,567 were whites and 4,518 were negroes.

Eighty-one jurors were examined on voir dire in order to get a trial jury, (R. 401-637)

As soon as the voir dire examination of a juror disclosed that he lived in the trouble area, about five miles square

as stated above, out he went by agreement, despite the fact that, if he had been examined further, it might have developed that he was a qualified juror in all respects. (R. 401-637)

The petitioners were found guilty without recommendation to mercy. Their codefendant Greenlee was also found guilty, but mercy was recommended for him. (R., unnumbered page between page 25 and page 26)

QUESTIONS INVOLVED

The questions presented are as follows:

1. WAS THE JURY CHOSEN IN FURTHERANCE OF AN ADMITTED POLICY OF SELECTING JURORS ACCORDING TO A SYSTEM OF RACIAL PROPORTIONAL REPRESENTATION AND OF LIMITING THE NUMBERS OF NEGROES SERVING ON JURIES IN VIOLATION OF THE GUARANTIES OF THE FOURTEENTH AMENDMENT?

2. WERE THE PETITIONERS, IN BEING DENIED A CONTINUANCE, DENIED THE ADEQUATE ASSISTANCE OF COUNSEL?

3. DID THE DENIAL OF THE PETITIONERS' MOTION FOR CHANGE OF VENUE AND THE DENIAL OF THEIR MOTION FOR A CONTINUANCE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY COMPELLING THE PETITIONERS TO UNDERGO A TRIAL DOMINATED BY PASSION AND PREJUDICE?

III.

ARGUMENT.

QUESTION ONE.

WAS THE JURY CHOSEN IN FURTHERANCE OF AN ADMITTED POLICY OF SELECTING JURORS ACCORDING TO AN ADMITTED POLICY OF SELECTING JURORS ACCORDING TO A SYSTEM OF RACIAL PROPORTIONAL REPRESENTATION AND OF LIMITING THE NUMBER OF NEGROES SERVING ON JURIES IN VIOLATION OF THE GUARANTIES OF THE FOURTEENTH AMENDMENT?

The jurors were selected from the registered voters of the County. There were 14,182 registered voters, of which 13,380 were whites and 802 were negroes. According to the 1945 State Census, there were 18,085 people of voting age in the County, of which 13,567 were whites and 4,518 were negroes.

Prior to the 1949 amendment of Section 40.01, Florida Statutes, only male persons were eligible for jury service. In 1949, Section 40.01 was amended so as to cause Subsection One thereof to read as follows:

> "Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months; provided however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

There is nothing in the record to indicate that, prior to the drawing of the jurors involved in this case, any woman had registered for jury duty pursuant to said Section 40.01 as amended in 1949.

The statutes of Florida do not specifically require that jurors be registered voters. However, Section 40.01(3), Florida Statutes, as last enacted in 1949, commands that:

> "In the selection of jury lists *only such persons as the selecting officers know, or have reason to believe, are law abiding citizens of* approved integrity, good character, *sound judgment and intelligence*, and who are not physically or mentally infirm, shall be selected for jury duty."

And Section 40.07(3), Florida Statutes, commands that:

> "BY INFIRMITY.—*No person not of sound* mind and *discretion shall be qualified to be a juror.*" (Emphasis supplied).

Therefore, the County Commissioners who selected the jurors were required by these statutes to select only persons who possessed sound judgment and intelligence and discretion. This justified the exclusion of persons, white and black, who exhibited their lack of these qualities by failing to register to vote.

The County Commissioners selected the jurors. The reason given by the Chairman of the Board of County Commissioners for selecting jurors from among the registered voters only was, "We select the jurors from the registered voters in the county as we feel that those who are not registered would not have a sufficient interest in our county to serve on the jury" (R. 353); and that, "We don't feel that the others are qualified to serve on jury if they do not have sufficient interest to register and partici-

pate in our gove nment affairs. *That's true both of white and colored"* (R. 355). (Emphasis supplied).

The reason thus given for selecting jurors from the registered voters was a lawful one. The County Commissioners did not abuse their discretion when they, in effect, determined that people who did not even bother to register to vote showed themselves so lacking in appreciation of their duties and responsibilities as citizens, and so lacking in interest in the affairs of their government, as to evidence that they were not citizens of sound judgment, intelligence and discretion. People cannot rightly be regarded as possessed of sound judgment, intelligence and discretion when they display completely opposite characteristics by turning their backs upon their citizenship duties and responsibilities and failing to qualify themselves to vote by registering.

Here, we point out that the record is devoid of any suggestion that anything prevented either negroes or whites from registering as voters, except their own indifference to their duties and responsibilities as citizens.

As was said by this Court in Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692:

> "The mere fact of inequality in the number selected does not in itself show discrimination. *A purpose to discriminate must be present* which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." (Emphasis supplied).

And the discrimination must be solely because of race, as appears from the following quotation from Patton v. Mississippi, 332 U. S. 463, 92 L. Ed. 76:

> "Sixty-seven years ago this Court held that state exclusion of Negroes from grand and petit juries *solely because of their race* denied Negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment. Strauder v. West Virginia, 100 US 303, 25 L. Ed. 664 (1880). A long and unbroken line of our decisions since then has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.'" (Emphasis supplied).

In the case at bar there was not only no purpose to discriminate against negroes solely because of their race, but there was no discrimination against negroes at all. In selecting jurors from among the registered voters, negroes and whites were treated alike. Neither negroes nor whites were selected unless they were registered to vote. An unregistered white man had no more chance of being selected than an unregistered negro had. The rule which was applied worked both ways. Certain it is that there was no discrimination which was purposeful and which was solely because of race.

The jurors were selected from the registered voters so that each race was proportionally represented, that is to say, the number of each race selected for jury duty was in the proportion that the number of registered voters of that race bore to the total number of registered voters.

The petitioners contend that this proportional representation of races on the jury violated the Fourteenth Amendment. They rely upon Cassell v. Texas, 94 L. Ed. 563 (Advance Sheet).

We are not unmindful of what was said in the several

opinions in the Cassell case with regard to proportional representation. However, the decision in the case was placed upon other grounds and, while what was said with regard to proportional representation may be persuasive, we do not think that it forecloses the point and we submit that it should now be held that proportional representation does not violate the Fourteenth Amendment.

To hold that jurors cannot be selected upon the basis of proportional representation of races would be to place jury commissioners and county commissioners in an impossible situation in the South.

In Mr. Justice Reed's opinion in the Cassell case, concurred in by the Chief Justice and by Mr. Justice Black and Mr. Justice Clark, it was said:

> "An accused is entitled to have charges against him considered by a jury in the selection of which there has been *neither inclusion nor exclusion because of race.*" (Emphasis supplied).

In Mr. Justice Frankfurter's opinion in the Cassell case, concurred in by Mr. Justice Burton and Mr. Justice Minton, it was said:

> "*The basis of selection cannot consciously take color into consideration.*" (Emphasis supplied).

By and large, the jury commissioners and county commissioners in the South have gracefully accepted, and in good faith are attempting to comply with, the decisions of the courts that negroes must not be discriminated against in the selection of jurors. Certainly that is true of Florida.

However, jury commissioners and county commissioners are mere mortals, endowed with no superhuman powers, and they cannot do that which is impossible for them to

accomplish, not even under the spur of judicial fiat. The historical background of the South being what it is, and human nature being what it is, it is an utter impossibility for the average jury commissioner or county commissioner to select any negroes at all for jury service unless he consciously takes color into consideration and selects negroes because they are negroes. The realities being what they are, it is impossible for him to select any negroes for jury service unless he makes up his mind that he must, and will, be fair to the negroes in selecting jurors, and unless he consciously selects negroes because they are negroes.

If the average jury commissioner or county commissioner does not consciously select negroes on the basis of race, because they are negroes and because the law forbids discrimination against negroes, the result will be that, with rare exceptions, no negroes at all will be selected for jury service.

The inevitable result will be that, within a few years, the charge can fairly be made that there has been a systematic exclusion of negroes, and the courts will sustain the charge and hold that the negroes have been unconstitutionally discriminated against, under the authority of such cases as Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567, Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074, and Patton v. Mississippi, 332 U. S. 463, 92 L. Ed. 76.

The only possible way to avoid having juries invalidated for systematic exclusion of negroes is to do the only thing which is within the power of jury commissioners or county commissioners to accomplish, that is, to determinedly and consciously select a fair proportion of negroes as jurors because they are negroes and because the negro race is entitled to a fair proportion of jurors.

The only method by which this can be done is to select upon the basis of proportional representation. Proportional

representation is just as fair to the negroes as it is to the whites. It discriminates against neither. It gives both equitable treatment. It is not discrimination against a group to give it its fair share of whatever is to be shared by several groups, whether jurors or not.

An accused cannot complain of discrimination against any race or group unless he is a member of it, and the only right the petitioners have to raise the question is based upon the fact that they are negroes. (See Annotation: 82 L. Ed. 1064; also see discussion of this point in Fay v. New York, 332 U. S. 261, 287, 91 L. Ed. 2043, 2059). So far as the record shows, there are no colors in Lake County except white and black. If there be citizens of any other color, the petitioners are not entitled to champion their cause; they must do that for themselves. The petitioners may champion only the cause of the negroes.

We submit that in the South selection of jurors on the basis of proportional representation is the only method that is humanly possible, practicable, and fair to both races; and that such a system of selection should not be invalidated with the result of leaving jury commissioners and county commissioners without any method of selecting jurors which is at the same time lawful, humanly possible for them to follow, and fair to both races.

QUESTION TWO.

WERE THE PETITIONERS, IN BEING DENIED A CONTINUANCE, DENIED THE ADEQUATE ASSISTANCE OF COUNSEL?

The trial began on September 1st. The petitioners had counsel from August 12th until September 1st, which was plenty of time to prepare for trial.

Before arraignment on August 12th, the trial court appointed Attorney Harry E. Gaylord to defend the petitioners, and the trial was set for August 29th pursuant to his agreement that it be set for that day.

There is nothing in the record to impugn Attorney Gaylord's ability as a lawyer, or his devotion to the cause which had become his by virtue of his appointment by the court.

Nevertheless, the National Association for the Advancement of Colored People, acting through its attorney, Franklin H. Williams, got into the case and requested Attorney Akerman to represent the petitioners. The result was that Akerman accepted the case on August 22nd. (R. 849) On August 25th, Attorneys Akerman, Price and Williams appeared in court as defense counsel. (R. 14) Whereupon, Gaylord was permitted to withdraw from the case. (R. 15)

However, it was not because of any supposed incompetency or lack of devotion to duty on Gaylord's part that the Association was moved to employ Akerman to represent the petitioners. In fact, the Association thought highly of Gaylord, as is evidenced by the fact that its representative, Attorney Williams, asked Gaylord if he was willing to be employed by the Association or by the defendants themselves. It was only when Gaylord declined such employment but told Williams that he would defend the case as a court appointed lawyer to the best of his ability, that the Association by-passed Gaylord and obtained Akerman's services. (R. 216). So, it is crystal clear that the Association did not consider that there was any incompetency or delinquency on Gaylord's part, and that the only reason the Association had for getting other counsel was that Gaylord, although willing, ready, and able to properly defend the petitioners, insisted on doing so only

in the capacity of court appointed attorney and was unwilling to be employed by outside sources.

It is apparent, therefore, that the petitioners had the services of competent counsel from the date Gaylord was appointed on August 12th, and not merely from the time Akerman accepted the case on August 22nd.

It is to be presumed that Gaylord exercised due diligence in working on the case between the time of his appointment on August 12th and the time Akerman was employed on August 22nd, and that Akerman and his associates availed themselves of what Gaylord knew about the case.

As a matter of fact, the Association's said Attorney, Williams, who appeared in court as associate defense counsel on August 25th, had begun his investigation of the case on July 31st. (R. 851)

Even if Williams had not begun investigating the case on July 31st, and even if Gaylord had not been representing the petitioners from August 12th until Akerman took over, and even if the petitioners had had no counsel at all before Akerman's employment on August 22nd, we submit that Akerman, Price and Williams had plenty of time between August 22nd and September 1st in which to prepare for trial.

It is true that Akerman was engaged in preparing motions and attending hearings thereon during a good part of the time between his employment and the trial. It is also true that, in Orlando, in Orange County, which adjoins Lake County, there was a tropical disturbance on two days, with quite a bit of wind which did quite a bit of damage. (R. 214) However, we find nothing in the record to indicate that this tropical disturbance extended to and

affected Lake County to such an extent as to prevent defense counsel from pursuing any investigation they wished to make there.

Although Akerman devoted a good deal of his time to preparing and presenting motions, the defense had two other lawyers, Price and Williams, who it must be assumed, were competent. Akerman and the Association wouldn't have had them if they had not been competent. Akerman carried the burden in the hearings on the motions. It does not appear that there was anything to prevent Price and Williams from utilizing their time to investigate and work on the case.

And it is not to be forgotten that the petitioners were right there in Lake County from August 12th on, available for any and all consultations and conferences which defense counsel desired to have with them.

As to witnesses, we find no proof in the record that any possible witness wasn't available right there in Lake County. The petitioners never claimed that any alibi witness existed, or that any witness existed and was not available who knew anything at all about the crime, about the petitioners' movements on the night of the crime, or about any other fact relevant to the case.

The only possible witnesses who might not have been readily available were the negroes who lived in the small trouble area and who were moved out for their own protection by responsible white people of the community. These negroes might have testified about the burning of the three houses and about the other disturbance in the trouble area. However, there is no showing in the record but that all of these negroes had returned to their homes long before the trial. Further, the State's witnesses estab-

lished every pertinent fact that these negroes could have proved, such as that the disturbance occurred in the trouble area, that the three houses were burned, and that the National Guard was called out. We again call attention to the fact that the disturbance had died down soon after the commission of the crime, and that there never was any disturbance or excitement anywhere except in the small trouble area.

As to jurors, defense counsel had ample time to investigate their qualifications. The first venire of 150 jurors was drawn on August 19th. (R. 11) There were no other jurors to investigate when the petitioners filed their motion for continuance on August 25th because the second venire of 50 jurors was not drawn until September 1st. (R. 21) Said second venire of 50 jurors was never used because the first venire of 150 jurors was not exhausted before a trial jury was selected from the first 81 veniremen examined on voir dire.

Gaylord was attorney for the petitioners from seven days before the time the first venire of 150 jurors was drawn on August 19th until he withdrew on August 25th, and it is fairly to be presumed that he already knew, or had investigated and found out, whether these 150 veniremen had any prejudice or other disqualification, and that he fully acquainted Mr. Akerman and his associates with all that he knew and had found out about these veniremen. Also, Associate Counsel Price and Williams had plenty of time to investigate these 150 prospective jurors, even during the time that Akerman was preparing his motions and attending hearings thereon.

On top of all that, the record discloses that defense counsel were in no way handicapped in trying the case. At the trial, they put forward every witness and every scrap of

evidence that they intimated was in existence in favor of the petitioners. They handled the case ably, so ably, in fact, that they succeeded in obtaining a recommendation of mercy for the younger Greenlee, even though the evidence showed him to be equally guilty with the petitioners.

There is no dispute about the law being that an accused is entitled to a reasonable time to advise with counsel and prepare his defense. The facts in this case show that the petitioners had sufficient time for that purpose. The facts in Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, upon which the petitioners rely, are so different from those in the case at bar that the Powell case cannot rightly afford any comfort to the petitioners herein.

QUESTION THREE

DID THE DENIAL OF THE PETITIONERS' MOTION FOR CHANGE OF VENUE AND THE DENIAL OF THEIR MOTION FOR A CONTINUANCE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY COMPELLING THE PETITIONERS TO UNDERGO A TRIAL DOMINATED BY PASSION AND PREJUDICE?

The petitioners contend that, after the refusal of a continuance, the denial of a change of venue was a denial of due process. We submit that this contention is not well founded.

There never was any excitement or any ill feeling toward negroes at any place except in the trouble area, which was about five miles square. The petitioners' own witness, Powers, a newspaper man, so testified. (R. 231-232; 238-240)

The record shows that race relations were in no way strained in the remainder of the county, where things went on as usual, where there was no excitement, trouble or friction, and where the two races were on the friendliest terms, as usual, throughout the time involved.

The petitioners' newspaper man witness, Powers, testified that he covered all of Lake County; that he found no great feeling of prejudice against the colored race in any other parts of the county; that there was no general feeling against colored people; that the rape case was no longer a topic of conversation in the county, and had all died out except for the last day or so when the trial date approached. (R. 238-240)

The petitioners' newspaper woman witness, Mrs. Reese, who came from Ohio not more than two and a half years before, testified that she was acquainted with conditions around Mt. Dora; that there was more satisfaction among the negroes there than in the industrial North; that the relations of the negroes with the whites around Mt. Dora were good; that she found no prejudice there against the colored race; and that Mt. Dora was not affected by the so-called rioting in the south end of the county. (R. 249-250)

The petitioners' newspaper man witness Morrow testified that at Clermont, some 6½ or 7 miles from Groveland, there was no rioting and that everything was peaceable there. (R. 262)

The petitioners' newspaper man witness Mullins testified that the relationship between the negroes and whites in Eustis was very good; and that there was no hysteria, prejudice or ill feeling in Eustis or any other place that he went. (R. 273-274)

The petitioners' witness Grant, another newspaper man,

testified that everything was normal in the county except in that particular territory around Groveland, with no prejudice against the negroes and with the feeling between the races very good. (R. 285)

In addition, the testimony of the State's witnesses showed that in the rest of the county the relations between the races were good; that there was no hysteria, prejudice or ill feeling; that things went on as usual; and that a fair and impartial jury could be obtained in the county. [See testimony of Ware, a Leesburg banker (R. 301, et seq.); Rogers, another Leesburg banker (R. 308, et seq.); Miller, a construction man who was mayor of Leesburg (R. 319, et seq.); White, a Mt. Dora banker (R. 326, et seq.); Burley, Mayor of Tavares (R. 334, et seq.); Hampton, a Leesburg *negro* life insurance agent (R. 341, et seq.); Prevatt, a Tavares business man (R. 345, et seq.); and Portland, a Mt. Dora Banker (R. 362, et seq.)].

It is interesting to note that Hampton, the negro life insurance agent, said that he was State representative of his company; that he had traveled from Key West to Pensacola, missing only two towns in the whole of Florida; and that he found the relationship between the negroes and whites in Leesburg to be the best in the State of Florida. (R. 342-343)

All that the petitioners put forward in opposition to this avalanche of testimony showing that there was no occasion for a change of venue were the ex parte affidavits of four persons attached to the application for removal, to the effect that they did not believe the defendants could receive a fair and impartial trial in the county because of ill feeling and prejudice (R. 87-90). The affiants gave no reason for the belief thus asserted by them. The affiants were not presented in court as witnesses, and were there-

fore not subject to cross-examination to determine whether they had any factual basis for such a belief. Each of the four affidavits was made in Lake County, and the record reveals no reason why the affiants could not have been presented as witnesses if the petitioners had wished them to testify and be subjected to cross-examination.

As we have indicated, everything quieted down in the trouble area within a few days after the crime was committed on July 16th.

It was admitted on August 29th, by the petitioners' amendments to their application for removal, that the petitioners were returned from Raiford to Lake County for arraignment and had remained in Lake County ever since (R. 175-176). The arraignment was on August 12th. (R. 38-41). So, by the time of the arraignment on August 12th, the whole of Lake County was so quiet and peaceable that the petitioners remained there until the trial on September 1st, without the slightest untoward incident being revealed by the record. (If there had been any, the petitioners would undoubtedly have alleged and proved it).

When all of these facts are considered, it is apparent that the trial judge did not palpably, or otherwise, abuse his discretion in denying the application for removal.

Further, only 81 jurors were examined on voir dire in order to get a trial jury. The following tabulation based on the record (R. 401-637) shows what happened to these 81 jurors:

Peremptorily challenged by Greenlee	10
Peremptorily challenged by Shepherd	10
Peremptorily challenged by Irvin	10
Peremptoriiy challenged by State	10

Excused because of having opinion		12
Excused by agreement of State and defense solely because they lived in trouble area		13
Excused for Cause:		
Because friend of prosecutrix's family	1	
Because a State witness	1	
Because related to State Attorney	1	
		3
Excused by agreement because of death in family		1
Sworn to try case		12
Total		81

As soon as the voir dire examination of a veniremen disclosed that he lived in the trouble area, about 5 miles square, he was at once excused by agreement. As shown by the above table, thirteen veniremen were excused on that basis.

The ease with which a qualified jury was selected, and the paucity of veniremen with opinions as to the petitioners' guilt (only 12), but emphasized the correctness of the trial court's order denying a removal.

The fact that the jury recommended mercy for Greenlee, apparently because of his youth, although the proof showed that he was just as guilty as the others, *conclusively refuted any idea that the trial jurors had any prejudice* and bore out the trial jurors' testimony on voir dire that they had no prejudice. If the jurors had been prejudiced against negroes, they would not have recommended mercy for Greenlee.

It is true that the trial judge promulgated special rules to govern the trial. The reason given by the judge for establishing those rules was stated by him as follows (R. 44):

> "I have every confidence that the citizens of Lake County will lend their aid and assistance to orderly and legal procedure to the end that complete justice may be accomplished in the trial set for August 29th in Tavares, Therefore the special rules promulgated for this trial are not to be taken or considered as any indication of fear or lack of confidence. The rules are promulgated as a precaution against the possibility of some agitator or agent being sent in to purposely start trouble to the end that the critics of the south might have something to base criticism upon."

The further you read into the record in this case, the more you become convinced that the reason thus given by the judge was actually what prompted the making of said special rules, and that there was actually no reason to fear any untoward incident on the part of the people of Lake County during the trial.

The record does not show that any untoward incident did occur during the trial, either inside or outside of the courtroom.

There is absolutely no basis for the petitioners' contention that their trial was dominated by passion and prejudice.

CONCLUSION

In conclusion, we respectfully submit that the petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

HOWARD S. BAILEY
Assistant Attorney General

REEVES BOWEN
Assistant Attorney General

Counsel for Respondent.